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Acting Under Authority Conferred by 28 U.S.C. §515  
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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES <i>ex rel.</i> STROM,	)	No. C 05-3004 CRB (JSC)
	)	
Plaintiffs,	)	<b>STIPULATION REGARDING</b>
	)	<b>WITHHELD AND REDACTED</b>
v.	)	<b>DOCUMENTS; [PROPOSED] ORDER</b>
	)	
SCIOS, INC. and	)	
JOHNSON & JOHNSON,	)	
	)	
Defendants.	)	

1 WHEREAS Plaintiffs, the United States of America and Relator Joe Strom, and  
2 Defendants, Scios, Inc. and Johnson & Johnson, (collectively the "Parties") through their  
3 undersigned counsel, have been continuing to meet and confer regarding the remaining discovery  
4 disputes in this case, including, but not limited to:

5 (1) Whether Defendants Scios, Inc. and Johnson & Johnson ("Defendants") should be  
6 required to withdraw their assertions of the work product protection and attorney-client privilege  
7 over communications between Jane Moffitt (Scios, Inc.'s VP of Regulatory Affairs) and other  
8 employees and contractors, and over documents prepared, reviewed, sent, or received by Jane  
9 Moffitt, and produce all documents withheld on these grounds. The United States recently  
10 learned that Ms. Moffitt did not have active California Bar membership while she worked at  
11 Scios, and thus was not engaged in the practice of law for the purpose of invoking the attorney-  
12 client privilege. Defendants dispute the consequence of such a determination because they  
13 contend the attorney-client privilege applies if the client reasonably believes that the confidential  
14 communication was with an attorney. The United States disputes Defendants' contention that  
15 they or their employees and agents could have reasonably believed that Ms. Moffitt was  
16 providing legal counsel to them.

17 (2) Whether Defendants should be required to produce in un-redacted form the  
18 "to/from/cc/bc/subject and date" lines in emails and email chains embedded in the text of emails  
19 otherwise identified as protected by the attorney-client privilege and work product doctrine; and

20 (3) Whether Defendants should be required to produce all portions of emails and other  
21 documents redacted or withheld that their counsel received, but do not expressly request or relay  
22 legal advice.

23 (4) Defendants contend they have produced over 9 million pages of documents in the  
24 course of discovery in this matter, and identified thousands of documents over which it has  
25 asserted claims of attorney-client privilege and work product protection. Defendants contend the  
26 burden of re-reviewing documents in the manner and to the extent sought by the government  
27 would be excessively burdensome.

28 IN ORDER TO RESOLVE ALL OF THESE DISPUTES, IT IS HEREBY STIPULATED

1 AND AGREED by the Parties, through their undersigned counsel of record, that:

2 (1) Defendants agree to withdraw their assertions of the work product protection and  
3 attorney-client privilege over communications between Jane Moffitt and other employees and  
4 contractors that were withheld solely based on Ms. Moffitt's participation as counsel, and  
5 documents prepared, reviewed, sent, or received by Jane Moffitt that were withheld solely based  
6 on Ms. Moffitt's participation as counsel. Further, Defendants will produce all documents  
7 withheld on these grounds, and will not lodge an objection to the admissibility of  
8 communications or documents based on an assertion that Ms. Moffitt was acting as an attorney  
9 (though retain the right to assert objections on other grounds).

10 (2) Plaintiffs agree not to argue that Defendants' production of these documents  
11 constitutes a subject matter waiver as to communications or documents over which Defendants  
12 assert a privilege or protection independent of Ms. Moffitt's participation – i.e. communications  
13 or documents otherwise privileged due to another attorney's participation.

14 (3) Plaintiffs further agree that they will not seek further reconsideration of this Court's  
15 decision that Scios' communications with Dr. Raymond Lipicky during the March 2002  
16 telephone call are privileged, provided another attorney participated in such communications, and  
17 such showing shall be made to the government by declarations.

18 (4) In lieu of amending their privilege logs to include the to, from, cc, bc, subject, and  
19 dates of all emails Defendants have redacted, Defendants will produce all emails and email  
20 chains without redacting this information for any email embedded in an email chain otherwise  
21 claimed as privileged. In the course of this un-redaction, Defendants also will review the content  
22 of such emails and email chains to confirm that such chains are properly claimed as privileged  
23 and, to the extent such communications are not properly protected by the attorney-client privilege  
24 or work product doctrine, Defendants will produce them to Plaintiffs.

25 (5) Defendants agree to re-review all emails and other documents identified by  
26 Defendants' privilege logs as "subject to ongoing legal and regulatory review," "pending legal  
27 review," "awaiting legal review," "submitted to attorney," or "sent for legal review" to confirm  
28 that communications are properly claimed as privileged and, to the extent such communications

are not properly protected by the attorney-client privilege or work product doctrine, Defendants will produce them to Plaintiffs, subject to redaction of any portions of such emails and documents that expressly request or relay legal advice, or that constitute the work product of an attorney other than Jane Moffitt.

(6) Defendants agree that all of the documents that may be produced pursuant to this Stipulation are authentic pursuant to Fed. R. Evid. 901 in that they are what they purport to be, and that they will not challenge the authenticity of such documents in this action.

(7) All of the document productions that may be made pursuant to this Stipulation will be made as soon as possible, and no later than December 1, 2011. If any additional discovery issues arise regarding the productions pursuant to this Stipulation, the United States shall have three weeks after the date all productions are complete to meet and confer with Defendants regarding such issues and to provide its portion of any joint discovery letter(s) to the Court relating to such issues. Defendants will then have seven days to provide their responsive portion, and the parties will have an additional seven days to make any final revisions and file the joint letter(s).

(8) Based on the foregoing, the United States will not file the joint letter it sent Defendants regarding the discovery disputes described above.

IT IS SO STIPULATED.

Respectfully submitted,

TONY WEST  
Assistant Attorney General

JOSHUA B. EATON  
Attorney for the United States, Acting  
Under Authority Conferred by 28 U.S.C. §515

Dated: October 19, 2011

By: /S/  
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JULIE A. ARBUCKLE  
THOMAS R. GREEN  
Assistant United States Attorneys

Dated: October 19, 2011

By: /S/  
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Dated: October 19, 2011

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LLP

Dated: October 19, 2011

By: /S/  
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ASHLEY MARTABANO, Esq.  
Attorneys for Defendants Scios, Inc. and  
Johnson & Johnson Inc.

**[PROPOSED] ORDER**

Pursuant to stipulation, IT IS SO ORDERED.

Dated: October 21, 2011

Jacqueline S. Corley  
JACQUELINE SCOTT CORLEY  
United States Magistrate Judge